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8 Lupica; Nantong Schmidt Opto-Electrical

Technology Co. Ltd.; Olivon Manufacturing Co.

9 Ltd.; Olivon USA; Pacific Telescope Corp.;

David Shen; Suzhou Synta Optical Technology

10 Co., Ltd.; SW Technology Corporation; Synta

Canada International Enterprises Ltd.; Synta

11 Technology Corp.

12 **UNITED STATES DISTRICT COURT**

13 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

14 IN RE TELESCOPES ANTITRUST
LITIGATION

Case No. 5:20-cv-03642-EJD

15 THIS DOCUMENT RELATES TO:

Hon. Edward J. Davila

16 SPECTRUM SCIENTIFICS LLC, RADIO
17 CITY, INC., and those similarly situated

18 Plaintiff,

19 vs.

20 CELESTRON ACQUISITION, LLC,
SUZHOU SYNTA OPTICAL
21 TECHNOLOGY CO., LTD., SYNTA
CANADA INT'L ENTERPRISES LTD., SW
22 TECHNOLOGY CORP., OLIVON
MANUFACTURING CO. LTD., OLIVON
23 USA, LLC, NANTONG SCHMIDT
OPTOELECTRICAL TECHNOLOGY CO.
24 LTD., NINGBO SUNNY ELECTRONIC CO.,
LTD., PACIFIC TELESCOPE CORP.,

25 Defendants.

**DEFENDANTS' MOTION TO STRIKE
DIRECT PURCHASER PLAINTIFFS'
OPPOSITION TO DEFENDANTS'
MOTION FOR TERMINATING
SANCTIONS AGAINST DPP PUTATIVE
CLASS FOR INTENTIONAL AND
IRREDEMIABLE DESTRUCTION OF
RELEVANT EVIDENCE BY THE SOLE
PUTATIVE CLASS REPRESENTATIVE,
OR ALTERNATIVELY, TO STRIKE THE
DECLARATION OF CHRISTOPHER
GROVES AND ALL ARGUMENTS
SUPPORTED BY THE DECLARATION;
REQUEST FOR MONETARY
SANCTIONS; MEMORANDUM OF
POINTS AND AUTHORITIES**

*[Filed concurrently with Declaration of
Christopher Frost]*

Hearing for Defendants' Motion:

Judge: Hon. Edward J. Davila

Date: April 6, 2023

Time: 9:00 a.m.

1 **TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that Defendants Celestron Acquisition, LLC; David Shen;
 3 Suzhou Synta Optical Technology Co., Ltd.; Nantong Schmidt Opto-Electrical Technology Co.
 4 Ltd.; Synta Technology Corp.; SW Technology Corporation; Synta Canada International
 5 Enterprises Ltd.; Olivon Manufacturing Co. Ltd.; Joe Lupica; Dave Anderson; Olivon USA; and
 6 Pacific Telescope Corp. (collectively “Moving Defendants”) respectfully move this Court for entry
 7 of an order to (i) strike the entirety of Direct Purchaser Plaintiffs’ Opposition to Defendants’ Motion
 8 For Terminating Sanctions Against DPP Putative Class For Intentional And Irremediable
 9 Destruction Of Relevant Evidence By The Sole Putative Class Representative (the “DPPs’
 10 Opposition”), (ii) strike the entirety of the declaration of Christopher Groves, (iii) strike all
 11 arguments supported by the declaration of Christopher Groves, (iv) order sanctions to compensate
 12 Defendants for the costs incurred in bringing this Motion and all costs related to attempting to obtain
 13 the deposition of Christopher Groves, and (v) issue bench warrant and an order to show cause to
 14 bring Christopher Groves before this Court to testify as to why the Court’s order that he provide
 15 testimony by March 31 was violated.

16 Defendants’ Motion for Terminating Sanctions is set for April 6, 2023, at 9:00 a.m., in the
 17 courtroom of the Honorable Edward J. Davila, located in the United States District Court for the
 18 Northern District of California, in Courtroom 4 on the 5th floor of the above-captioned court located
 19 at 280 South 1st Street, San Jose, California 95113.

20 Please take notice that on the Court’s earliest available date, or on or in advance of the
 21 hearing date set for Defendants’ Motion for Terminating Sanctions, Defendants’ will move this
 22 Court for an order for Defendants’ instant Motion to Strike.

23 This Motion is based upon the fact that the DPPs have willfully disregarded an explicit and
 24 direct order of this Court in failing and refusing to produce Christopher Groves for deposition prior
 25 to March 31. The Court ordered that DPPs “must make Mr. Groves available for deposition by
 26 defendants **on or before March 31, 2023**. DPPs shall advise defendants by **no later than noon on**
 27 **March 23, 2023** of three days and times during which Mr. Groves is available for deposition.”
 28 [emph. added.] [ECF No. 366.] The Court issued that order because DPPs submitted three “expert”

1 declarations of Mr. Groves in support of the DPP Motion To Enforce Court Order, and DPPs’
 2 Opposition to Defendants’ Motion for Terminating Sanctions, and, therefore, Defendants have a
 3 right to take Mr. Groves’ declaration in advance of the April 4 and April 6 hearings on the two
 4 Motions, limited to the scope of those declarations.

5 Notwithstanding the clear order of this Court, the DPPs did not provide Order-compliant
 6 dates, but instead submitted a pleading to this Court claiming that Mr. Groves was “unavailable”
 7 and offered dates only after the April 4 hearing—defeating the entire point of the depositions and
 8 completely undermining this Court’s order.

9 To state the obvious, compliance with this Court’s order was not optional, and DPPs’ refusal
 10 to comply irretrievably prejudices Defendants.

11 This Motion is based upon: (i) the Court Order dated March 22, 2023 (ECF No. 366), and
 12 DPPs’ Response to the Court Order (ECF No. 367), (ii) the parties’ letter brief concerning
 13 scheduling a deposition of Mr. Groves (ECF No. 364), (iii) Defendants’ Motion for Terminating
 14 Sanctions and supporting papers (ECF No. 322), (iv) DPPs’ Opposition to the Motion and
 15 supporting papers (ECF No. 341), (v) Defendants’ Reply and supporting papers (ECF No. 349), (vi)
 16 Defendants’ Notice of Errata (ECF No. 338), (vii) the Memorandum of Points and Authorities filed
 17 herewith, (viii) the Declaration of Christopher Frost Filed herewith, (ix) all of the pleadings, files,
 18 and records in this proceeding, (x) all other matters of which the Court may take judicial notice; and
 19 (xi) any argument or evidence that may be presented to or considered by the Court prior to its ruling.
 20

21 DATED: March 27, 2023

WEINBERG GONSER FROST LLP

22 By: /s/ Christopher Frost

23 CHRISTOPHER FROST

24 Attorneys for Defendants, Dave Anderson;
 25 Celestron Acquisition, LLC; Joe Lupica; Nantong
 26 Schmidt Opto-Electrical Technology Co. Ltd.;
 27 Olivon Manufacturing Co. Ltd.; Olivon USA;
 28 Pacific Telescope Corp.; David Shen; Suzhou
 Synta Optical Technology Co., Ltd.; SW
 Technology Corporation; Synta Canada
 International Enterprises Ltd.; Synta Technology
 Corp.

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1 *Young v. O'Reilly Automotive Stores, Inc.*
2 (2018) 23

3 **Other Authorities**

4 FRCP 37(b)(2)(A) 15
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Motion was required based on DPPs’ deliberate refusal to comply with a direct Court order. In support of the DPPs’ Opposition to Defendants’ Motion for Terminating Sanctions, set for hearing on April 6, DPPs submitted a declaration of Christopher Groves¹. The declaration—albeit without any foundation—purports to go to the heart of the issues in the Defendants’ Motion. Defendants requested repeatedly for weeks for dates to depose Mr. Groves. No dates were ever provided, and Defendants were forced to move to compel. Judge DeMarchi then ordered DPPs to produce Christopher Groves **on or before March 31**, with the testimony to be limited to the issues raised in the subject declarations². DPPs refused. Rather, they submitted a pleading claiming that Mr. Groves was “unavailable.” DPPs then offered dates that were after the April 4 hearing on the DPP Motion—thereby undermining the entire purpose of the Order.

Had DPPs offered deposition dates when Defendants requested, perhaps Mr. Groves’ schedule would have been accommodating. Nevertheless, Mr. Groves’ purported unavailability should not prejudice Defendants.

This Court ordered that DPPs make Mr. Groves available for his deposition before March 31. DPPs did not comply with the order of this Court and made a cynical proposal (in violation of the Court order), to make him available one day before the April 6 hearing. Producing Christopher

¹ Defendants have filed a similar companion Motion to Strike before Judge DeMarchi, for an entry of order to strike Direct Purchaser Plaintiffs’ Motion to Enforce Discovery Order and for Sanctions for Violation of Court Order (the “DPPs’ Motion”), or alternatively, to strike the declarations of Christopher Groves submitted in support of the DPPs’ Motion, and all arguments supported by the declarations of Christopher Groves. Both Motions to Strike are based on the same facts that Christopher Groves submitted declaration(s) which DPPs heavily relied upon in their arguments, but DPPs refused to present Mr. Groves for the Court-ordered deposition.

² Besides Groves’ declarations in support of DPPs’ Opposition, DPPs also submitted an opening declaration and then a reply declaration of Christopher Groves in support of DPPs’ Motion which will be heard by Judge DeMarchi on April 4, 2023. Those declarations—albeit without any foundation—purport to go to the heart of the issues in the DPP Motion. The Court-ordered deposition aimed to address issues raised in all three declarations in advance of both the April 4 and April 6 hearings.

Groves for deposition hours before the Court hearing on April 6 does not provide Defendants time to adequately prepare for the April 6 hearing, much to Defendants' prejudice and detriment. Defendants had previously proposed that the deadline for Defendants to submit its Reply Brief to DPPs' Opposition to Defendants' Motion for Terminating Sanctions be extended until after the completion of the deposition of Christopher Groves. DPPs rejected that proposal. Defendants already sustained prejudice by the necessity of filing a Reply to DPPs' Opposition, which heavily relied upon Groves' declaration, without first taking Groves' deposition. Defendants cannot be further prejudiced for not having an opportunity to take Groves' deposition within a reasonable time before the April 6 hearing. The Court set March 31 as the deadline to take Groves' deposition and DPPs refused to comply with the Court Order. The conduct of DPPs in ignoring the Court order is a serious wrong in its own right. The wrong would be compounded and prejudicial to Defendants were the deposition (that Defendants sought to schedule for weeks) be conducted hours before the subject Court hearing. The conduct of DPPs in this matter cannot be countenanced, let alone rewarded by prejudicing Defendants.

Therefore, Defendants move to strike the DPP Opposition to the Defendants' Motion for Terminating Sanctions, or alternatively, to strike the Groves declaration and all arguments in the DPPs' Opposition that rely on Mr. Groves' declaration. Defendants also request monetary sanctions and for Mr. Groves to appear before this Court and explain his refusal to comply.

II. FACTUAL BACKGROUND

A. DPPs File Declarations by Christopher Groves Raising Substantive Arguments Relevant to Two Different Motions

On February 8, February 27, and March 1, DPPs filed three separate declarations by purported expert Christopher Groves. [See Declaration of Christopher Frost, filed concurrently herewith ("Frost Decl."), ¶2.] The February 8 and March 1 declarations were submitted in support of DPPs' Motion to be heard on April 4. The February 27 declaration was submitted in support of DPPs' Opposition to Defendants' Motion for Terminating Sanctions, which will be heard before Judge Davila on April 6. [Id.] All three declarations heavily relied upon Christopher Groves' alleged expertise, testimony, and opinions concerning key central and material issues in the two

Motions which will be heard by this Court. The March 1 declaration also contained substantial new evidence. [*Id.* at ¶3.]

On February 28, 2023, Christopher Frost, counsel for the Defendants, immediately attempted to schedule the deposition of Christopher Groves for a date prior to the April 4 and April 6 hearings. [Frost Decl., at ¶5, Ex. 1.] The deposition was required to test the information, opinions, and factual predicates contained in each of the three Groves Declarations.

B. DPPs Refuse to Provide Deposition Dates for Mr. Groves

In response to Defendants' good faith attempt to depose Christopher Groves, the DPPs engaged in a course of conduct that was intended to, and which did, stonewall and intentionally frustrate Defendants' right to depose Christopher Groves. Between February 28, 2023 and March 21, 2023, notwithstanding multiple attempts by Defendants to schedule the deposition, DPPs failed and refused to set a date for the deposition of Christopher Groves. Had the facts been otherwise, and had DPPs acted reasonably and appropriately, Defendants would not have had to seek relief from this Court to order the deposition of Christopher Groves (not that the Order of the Court ultimately made any difference to the DPPs). [Frost Decl., at ¶6.] The multiple and repeated good faith requests by Mr. Frost to schedule the deposition of Christopher Groves was met with a pattern of rope-a-dope deception, obfuscation, and obstruction as set forth in the following timeline:

Date	Christopher Frost on behalf of Defendants	Ron Fisher on Behalf of DPPs
February 28, 2023 (One day after DPPs filed their Opposition to Motion for Terminating Sanctions)	Defendants request to take a deposition of Chris Groves in short order. [Frost Decl., Ex 1.]	No Response from DPPs Counsel.
March 9, 2023	Having not heard any response from DPPs for ten days, Defendants	DPPs' Counsel refused to produce Groves, (wrongfully)

1		noticed Christopher Groves’	claiming that the issue would be
2		Deposition, and advised DPPs that	decided by Judge Davila during
3		Defendants would like to discuss the	the Status Conference hearing on
4		scheduling of Mr. Groves’ deposition	March 13, 2023, and refusing to
5		at their regularly scheduled meet-	continue the conversation
6		and-confer call at 3:30 p.m. PST.	“before the Court has decided the
7		[<i>Id.</i> , at ¶7, Ex. 2.]	issues.” [<i>Id.</i> , at ¶7, Ex. 2.]
8	March 9, 2023	Defendants suggest the parties brief	
9	(continued email	the issue with the Court given the fact	
10	conversation)	that the Court is not going to	
11		determine Groves’ deposition	
12		schedule on March 13. Defendants	
13		advised that they did not have the	
14		luxury of the delay DPPs are	
15		creating. [<i>Id.</i> , at ¶8, Ex. 2.]	
16	March 9, 2023, at	Defendants punctually attended the	Without any notice whatsoever,
17	3:30 p.m., at the	meet and confer conference and were	DPPs’ Counsel failed to appear
18	weekly meet and	prepared to further meet and confer	at the regularly scheduled meet
19	confer	on this issue. [<i>Id.</i> , at ¶9.]	and confer. [<i>Id.</i> , at ¶9.]
20	March 10, 2023	Defendants sent DPPs their portion	
21		of the applicable letter brief and	
22		requested that DPPs return their	
23		portion by March 17. Although	
24		Defendants did not have the luxury of	
25		time, Defendants tried to be	
26		thoughtful and gave DPPs more than	
27		enough time to return their portion.	
28			

1		[<i>Id.</i> , at ¶10, Ex. 3.]	
2	March 13, 2023		DPPs continued to refuse to
3			provide DPPs’ portion of the
4			letter brief, and continued to
5			refuse to provide a date until
6			“after Judge Davila issues his
7			order following today’s [3/13]
8			status conference....” DPPs
9			further (wrongfully) threatened
10			Defendants that “If Defendants
11			insist upon putting another
12			motion before Judge DeMarchi
13			regarding matters presently
14			before Judge Davila—and which
15			Judge Davila expressly said on
16			the record he was taking up to
17			free up Judge DeMarchi’s
18			calendar—we will explain to
19			Judge DeMarchi that your
20			motion is unripe and filed
21			without complying with her
22			Standing Order re Civil Cases.”
23			[<i>Id.</i> , at ¶11, Ex. 4.]
24	March 15, 2023	As expected, Judge Davila did not	
25		address the deposition schedule of	
26		Groves at the March 13 hearing.	
27		Defendants urged DPPs to return	
28			

1		their portion of the brief given that	
2		“we [“the parties”] both know that	
3		the Groves deposition will not be	
4		addressed in Judge Davila’s order.”	
5		[<i>Id.</i> , at ¶12, Ex. 5.]	
6	March 16, 2023		DPPs again, wrongfully insisted
7			that “[t]he matters asserted in
8			your letter brief are before Judge
9			Davila and the parties should
10			await that order, then confer.”
11			DPPs sent their portion
12			specifically explaining that fact.
13			[<i>Id.</i> , at ¶13, Ex. 6.]
14	March 16, 2023	On the same day that DPPs sent their	DPPs failed to respond.
15	(continued email	portion of the letter brief, Defendants	
16	conversation)	returned its reply portions of the letter	
17		brief only to address issues raised by	
18		DPPs and request DPPs’ approval for	
19		filing on the same day or DPPs	
20		provide the final comments. [<i>Id.</i> , at	
21		¶14, Ex. 7.]	
22	March 17, 2023	Defendants followed up on the letter	DPPs refused to provide the final
23		brief. Defendants reiterated that	comments on the letter brief or
24		Defendants were pressed for time	approve the filing, claiming they
25		given the schedule of hearings in	had more urgent matters to
26		early April. [<i>Id.</i> , at ¶15, Ex. 8.]	handle. DPPs were intentionally
27			and willfully dragging this issue
28			

1			out, and attempting to preclude
2			the issue from being timely
3			adjudicated by the Court, to
4			Defendants' prejudice. DPPs
5			goal was to defeat the entire
6			purpose of taking Mr. Groves'
7			deposition prior to the April
8			hearings. [<i>Id.</i> , at ¶15, Ex. 8.]
9	March 17, 2023	Having no alternative options,	DPPs did not respond to
10	(continued email	Defendants were forced to advise	Defendants' email.
11	conversation)	DPPs: "Ron: You are consistently	
12		refusing to meet and confer and	
13		consistently working to stall this	
14		process. We will file Monday at noon	
15		with or without your consent. We are	
16		simply out of time to obtain Mr.	
17		Groves' deposition before April 4."	
18		[<i>Id.</i> , at ¶15, Ex. 8.]	
19	March 20, 2023		Still, DPPs refused to return their
20			final edits on the letter brief and
21			tried to drag this process out even
22			longer, to the next evening, so the
23			filing would not likely occur
24			until even later. [<i>Id.</i> , at ¶17, Ex.
25			9.]
26	March 20, 2023	Defendants agreed to give DPPs until	
27	(continued	"end of day tomorrow" to provide the	
28			

1 conversation)	revised insert. [<i>Id.</i> , at ¶17, Ex. 9.]	
2 March 21, 2023		At 6:02 p.m. on March 21, DPPs
3		sent their revised insert and their
4		exhibits. [<i>Id.</i> , at ¶18, Ex. 10.] In
5		order to avoid further delay
6		which Defendants anticipate
7		would be created by DPPs if
8		Defendants made any further
9		edits on DPPs’ returned brief,
10		Defendants filed the version sent
11		by DPPs the same evening. [<i>Id.</i> ,
12		at ¶19.]

13
14 Defendants ultimately had no choice but to file a motion to compel.

15 **C. This Court Orders That The Deposition of Christopher Groves Take Place On**
16 **Or Before March 31, 2023**

17 In response to the motion of Defendants, on March 22, 2023, Judge Di Marchi ordered that
18 DPPs: “must make Mr. Groves available for deposition by defendants **on or before March 31,**
19 **2023.** DPPs shall advise defendants by **no later than noon on March 23, 2023** of three days and
20 times during which Mr. Groves is available for deposition.” [emph. added.] [ECF No. 366.] [Frost
21 Decl., at ¶20.]

22 **D. DPPs Willfully Disobey the Order of This Court**

23 In spite of the plain and direct language of the Court’s March 22 Order, the DPPs refused to
24 produce Mr. Groves for a Court-ordered deposition prior to March 31, 2023 (while conveniently
25 and shamelessly offering three days of purported availability immediately *after* the April 4 hearing).
26 Rather, DPPs, without explanation or excuse, claimed Groves was “unavailable” and only offered
27 deposition dates after the April 4 hearing. [ECF No. 367.] [Frost Decl., at ¶¶21-22.]

28 What the DPPs have offered is not what the Court ordered, and frustrates the purpose of the

1 deposition altogether. The testing by oral examination of the matters asserted in Christopher Groves’
 2 declarations before the April 4 (and April 6 hearings) are the very reason this Court ordered the
 3 deposition of Christopher Groves. Due to DPPs’ willful disregard of the Court Order to have
 4 Christopher Groves depose as ordered before March 31, 2023, Defendants have been substantially
 5 prejudiced by their inability to take the court-ordered deposition *in advance of* the April 4 hearing.
 6 [Frost Decl., at ¶23.]

7 Defendants have been working diligently to attempt to reduce the number of disputes
 8 required to be submitted to this Court. Unfortunately, due to DPPs’ blatant recalcitrance, Defendants
 9 had no choice but to submit this Motion. [Frost Decl., at ¶24.]

10 **III. ARGUMENT**

11 **A. Sanctions Are Available for DPPs’ Refusal to Comply With A Court Order**

12 It is one thing for DPPs to engage in wrongful conduct in its dealings with the Defendants.
 13 It is quite another matter for DPPs to intentionally violate a lawful order of this Court.

14 The Court has broad powers to curtail discovery abuses. However, the Court has even
 15 greater and more significant authority to impose sanctions against a person or party for failure to
 16 obey a prior court order compelling discovery. FRCP 37(b)(2)(A); *United States ex rel. Wiltec*
 17 *Guam, Inc. v. Kahaluu Const. Co., Inc.* (9th Cir. 1988) 857 F2d 600, 602. That is exactly the matter
 18 at hand.

19 Sanctions are appropriate if a party, or someone under the party’s control, fails to be sworn
 20 or answer questions at deposition after the court orders it to do so. FRCP Rule 37(b)(2)(A) and (B).
 21 A party who fails to appear for deposition is subject to sanctions even in the absence of a prior order.
 22 FRCP 37(d); *Hilao v. Estate of Marcos* (9th Cir. 1996) 103 F3d 762, 764-765. Moreover, there is
 23 no requirement that failure to appear or respond be willful before sanctions (except dismissal) may
 24 be imposed. *Lew v. Kona Hosp.* (9th Cir. 1985) 754 F2d 1420, 1426; Adv. Comm. Notes (1970).
 25 Here, however, there is no question that the DPPs illegal conduct in violation of the Court order
 26 here is both knowing and willful.

27 For a failure to obey a discovery order, the court has a palette of remedies and may issue an
 28 order prohibiting the disobedient party from supporting or opposing designated claims or defenses,

1 or from introducing designated matters into evidence. FRCP 37(b)(2)(A)(ii); *Von Brimer v.*
 2 *Whirlpool Corp.* (9th Cir. 1976) 536 F2d 838, 844; *See Dale K. Barker Co., P.C. v. Valley Plaza*
 3 (10th Cir. 2013) 541 Fed.Appx. 810, 816 (failure to produce documents in discovery until just prior
 4 to trial justified sanction prohibiting their use in case-in-chief at trial); *See also, Sentry Ins. A Mut.*
 5 *Co. v. Brand Mgmt., Inc.* (E.D. NY 2013) 295 FRD 1, 5 (preclusion of evidence warranted due to
 6 willful obstruction and obfuscation).

7 In assessing whether to preclude a witness' testimony, courts consider: (1) the party's
 8 explanation for failure to comply with the discovery order; (2) the importance of the testimony of
 9 the precluded witness; (3) any prejudice suffered by the opposing party as a result of having to
 10 prepare to meet the new testimony; and (4) the possibility of a continuance. *Reilly v. NatWest*
 11 *Markets Group Inc.* 2nd Cir. 1999) 181 F3d 253, 269; *see Amersham Pharmacia Biotech, Inc. v.*
 12 *Perkin-Elmer Corp.* (ND CA 2000) 190 FRD 644, 648 (exclusion sanction generally improper if no
 13 undue prejudice to the other side). Here, without evidence or excuse, the anemic reply to an order
 14 by a Federal Court Judge was basically that a deposition by March 31 is not convenient, so the
 15 witness will not be produced. The response can only be viewed as one that is borne of inexperience,
 16 ignorance or arrogance leading to the willful refusal to comply with a direct order of this Court.

17 The court may sanction the disobedient party by striking pleadings, staying further
 18 proceedings pending compliance, or terminating the action by default or dismissal. FRCP
 19 37(b)(2)(A)(iii)- (iv); *Toth v. Trans World Airlines, Inc.* (9th Cir. 1988) 862 F2d 1381, 1385; *see*
 20 *SEC v. Razmilovic* (2nd Cir. 2013) 738 F3d 14, 26-27 (entering default judgment); *Universal Health*
 21 *Group v. Allstate Ins. Co.* (6th Cir. 2013) 703 F3d 953, 956 (dismissal of complaint for repeated
 22 violation of discovery orders).

23 **B. DPPs Failed To Comply With This Court's Order Compelling Them to**
 24 **Introduce Mr. Groves For Examination Before March 31, 2023: Significant**
 25 **Sanctions Should Follow**

26 DPPs Opposition should be stricken for the following reasons:

27 DPPs are in violation of the order of this Court. Because DPPs submitted three declarations
 28 of Christopher Groves, the Court ordered that DPPs must make Mr. Groves available for deposition

1 by defendants on or before March 31, 2023. DPPs have now flatly failed and refused to comply
 2 with the Court order. The three declarations *were the very reason* that the Court ordered Mr. Groves’
 3 deposition. The DPPs’ Opposition to the underlying Motion, which relies so heavily on the
 4 declaration of Christopher Groves should therefore be stricken. The mathematical calculus is quite
 5 simple: No deposition equals no DPP Opposition.

6 In this case, all four elements the courts consider in assessing whether to preclude a witness’
 7 testimony are satisfied.

8 **1. The Importance Of The Testimony Of The Precluded Witness**

9 The testimony of Mr. Groves (who claims, but does not substantiate, his unavailability to
 10 appear by the Court ordered date) is very important, and the Court recognized that fact. DPPs’
 11 Opposition heavily relies on Christopher Groves’ opinions as expressed in his declaration.
 12 According to Mr. Groves’ declaration submitted in support of DPPs’ Opposition, he was specifically
 13 retained to “analyze the information typically contained in the “Composite Reports” produced by
 14 Plaintiff Radio City, Inc. (“Radio City”) and to assess the effect on the parties’ abilities to perform
 15 economic analysis with respect to liability, damages, and class certification *if data in those reports*
 16 *were missing.*” [emph. added.] Groves has opined that the reports that the DPPs have admitted to
 17 intentionally destroying have no impact on any such economic analysis. Christopher Groves’
 18 knowledge of the predicate facts, experience, methods and manner of review the “Composite
 19 Reports” and other documents, as well as his opinions and analysis leading to the formation of his
 20 opinions, need to be tested at Deposition, as the Court recognized and therefore ordered.

21 **2. The Prejudice Suffered By Defendants As A Result Of Having To** 22 **Prepare To Meet The New Testimony**

23 It was imperative that Defendants be provided with the opportunity to examine Christopher
 24 Groves relating to the foundation and factual basis for his purported opinions as to the matters
 25 expressed in his three declarations in advance of the hearings pending before this Court in early
 26 April. Defendants are therefore substantially prejudiced due to their inability to take the deposition
 27 of Mr. Groves before the hearings. The DPPs have engaged in conduct calculated to deliver exactly
 28

1 the result that they wanted to achieve: No deposition of Christopher Groves will take place before
 2 the Court hearings, despite an express Court order to the contrary.

3 **3. DPPs Have No Reasonable Explanation For Failure To Comply With** 4 **The Court Order**

5 Although DPPs may claim that they cannot produce Christopher Groves for deposition by
 6 the time of the Court ordered date because of Mr. Groves’ “prior scheduled travel,” and therefore
 7 are not subject to sanctions under FRCP Rule 37(b)(2)(B), this “impossibility of performance” is
 8 the direct result of DPPs’ long-term plan and course of conduct to refuse to provide a date for
 9 Christopher Groves’ deposition, causing the irremediable and manufactured delay that led to the
 10 outcome desired by the DPPs. On February 29, 2023 – the day after DPPs filed their Opposition and
 11 Mr. Groves’ declaration - and in accordance with this Courts’ standing Order [ECF 169], Defendants
 12 repeatedly and conscientiously requested a date for the deposition of Christopher Groves, all to no
 13 avail. Had DPPs’ Counsel not: (i) engaged in a course of conduct designed and intended to “run the
 14 clock” by refusing to provide a deposition date for so long a period of time; and, (ii) refused to meet
 15 and confer to address this issue and, (iii) refused to provide DPPs’ portion of the letter brief to
 16 willfully preclude the issue from being timely adjudicated by the Court, Mr. Groves’ alleged
 17 “scheduling conflict” would not have been an issue and Defendants would not have been prejudiced.
 18 DPPs’ conduct in this matter is willful and done in bad faith. Even after the Court has ordered
 19 Christopher Groves to appear, DPPs counsel and Christopher Groves are still unwilling to allow the
 20 deposition, claiming “unavailability.” However, Christopher Groves could be available if he and
 21 the DPPs wanted him to be available. The excuse of “unavailability” in the face of a Federal Court
 22 order is both inexcusable and confounding. This Court has inherent power to issue sanctions for
 23 evidence preclusion, among other sanctions, based on the standard of law provided above.

24 **4. It Is Confirmed That DPPs’ Motion Will Be Heard On April 4 and** 25 **Defendants’ Motion for Terminating Sanctions Will Be Heard On April** 26 **6**

27 On March 21, 2023, Defendants respectfully submitted a status update concerning the
 28 proceedings before this Court (the “March 13 Hearing”) as they relate to the Defendants’ production

1 of transactional data, and DPPs' Motion To Enforce Discovery Order. (ECF No. 360) In its Motion,
 2 DPPs requested a further order that Defendants produce their transactional data, and issue sanctions
 3 for the alleged prejudice occasioned by alleged failure to earlier produce. Setting aside the fact that
 4 the Defendants are in compliance with their production obligations, this Court addressed at the
 5 March 13 hearing the issues raised in the DPPs' Motion. Specifically, this Court allowed the
 6 Defendants until June 1 to complete all productions, including, specifically, the transactional data.

7 On March 24, 2023, DPPs responded to Defendants' Status Update (ECF No. 368), by
 8 selectively and misleading stating that Judge Davila only set a date for Defendants to complete their
 9 production of Chinese-language documents, and that this Court said nothing about Defendants'
 10 transactional data. (ECF No. 368, 1:19-21.)

11 On March 24, 2023, Judge DeMarchi, having reviewed DPPs' response to Defendants'
 12 Status Update, ordered that DPPs' Motion will be heard as scheduled on April 4, 2023. (ECF No.
 13 369) As such, it appears that there is no possibility of a continuance of that hearing. Neither should
 14 this Court continue the April 4 hearing and thereby condone the DPP misconduct.

15 The hearing on Defendants' Motion for Terminating Sanctions remains scheduled on April
 16 6, 2023. Neither should this Court continue the April 6 hearing and thereby condone the DPP
 17 misconduct.

18 **C. Christopher Groves' Declaration Must Be Stricken Due To His Refusal to**
 19 **Attend The Court-Ordered Deposition**

20 This Court should strike the declaration of Christopher Groves in support of the DPPs'
 21 Opposition given that DPPs violated the Court Order and refused to make Christopher Groves
 22 available for a deposition before March 31. The declaration (along with two other declarations of
 23 Mr. Groves³) are the very reason this Court ordered his deposition. Without taking Christopher
 24 Groves' deposition, Defendants are crippled by a lack of information to fully object to the
 25 declarations, defend DPPs' Motion, and adequately prepared for Defendants' Motion for

26 _____
 27 ³ DPPs' arguments in its Motion heavily relied upon Christopher Groves' purported review of
 28 Celestron's transactional data, and opinions as set forth in his two declarations, which are solely
 based on Mr. Groves' knowledge and experience.

1 Terminating Sanctions.

2 Without the ability to test Mr. Groves upon oral examination at deposition the Court and the
3 Defendants are dealing with unsubstantiated and untested horseback opinions from a third party and
4 nothing more. For example, in opposition to Defendants' Motion for Terminating Sanctions, Mr.
5 Groves claims that the reports that were intentionally destroyed in December 2022 by DPPs are not
6 important, and Celestron's transactional data is the best source of information to calculate Radio
7 City's "lost money and customers." It is unknowable what documents or information, if any, were
8 provided to Christopher Groves, upon which he relies, that would provide any credible foundation
9 allowing him to make any statements, let alone allowing for the formation of any opinions
10 concerning the newly referenced "Composite Reports" that have only recently been identified but
11 which have never been produced.

12 The basis on which any of Christopher Groves understandings or opinions testified to in his
13 declaration and the manner in which he came to have any "personal knowledge" of those Reports is
14 also completely unknown and unclear. It is also unknown whether, or to what extent, Mr. Groves,
15 received, reviewed or analyzed the subject "Composite Reports", which he then speculatively
16 asserts contain duplicative or immaterial information. Further, the principles, and methods used by
17 Christopher Groves to develop his opinions presented in his declaration that any information
18 contained in the questionable "Composite Reports" can be found "elsewhere" in Radio City's
19 produced documents; or that the intentionally destroyed data contained therein is somehow
20 immaterial. It is unclear how Mr. Groves' understanding and opinions concerning his apparent
21 contention that sales data between Radio City and its own customers (that was admittedly destroyed
22 by Radio City) would, in the estimation of Mr. Groves not have a probative impact (very likely
23 favoring Defendants) concerning Radio City's allegation that it "lost money and customers" due to
24 Defendant's conduct. The fact of the admitted destruction of documents by DPPs that concerned
25 matters of material importance cannot be credibly minimized, and certainly not by a declarant who
26 failed to even show up in time to be tested at deposition as specifically ordered by the Court.

27 For this Court's information, with regard to the matter before Judge DeMarchi concerning
28 DPPs' Motion to be heard on April 4, the issues run a parallel path. The principles and methods

1 used by Christopher Groves to develop his opinions presented in both declarations in that matter are
 2 unknown. Christopher Groves' knowledge or expertise concerning the manner, method or means of
 3 reviewing Defendants' transactional data and searching millions of references for responsive
 4 information are also unknown. Christopher Groves, without any valid predicate foundation,
 5 attempted to testify concerning the inner workings of document management platforms about which
 6 he has not established his experience, and knowledge. It is unknown whether and/or how much Mr.
 7 Groves knows about Synteline (and its capabilities) and SAP (and its capabilities). Mr. Groves
 8 opined that Defendants data is subject to "filters" that "have been applied by Defendants prior to
 9 production" and "Defendants could easily produce all their transactional data." (ECF No. 318-1,
 10 Groves Decl., ¶10, ECF No. 345-1, Groves Decl., ¶11.) It is exceedingly sloppy and misleading to
 11 use the word "filter" in the subject declarations. It is also unclear what is meant by the statement
 12 that the data could have been produced by "simply producing all of the raw files used by the
 13 interface, including documentation of the relationship" and what exactly Groves believes
 14 Defendants could have done differently to achieve that goal. (ECF No. 345-1, Groves Decl., ¶11.)
 15 It is also unclear how Christopher Groves reached the conclusion that "the cost was *incorrectly*
 16 reported at null or zero." [emph. added.]

17 The declaration of Christopher Groves in support of DPPs' Opposition must be stricken due
 18 to his failure and refusal to appear at a court-ordered deposition which was ordered and to precisely
 19 address, and for the sole purpose of addressing, these issues raised in his declaration.

20 **D. All Arguments Supported by Christopher Groves' Declarations Must Be**
 21 **Stricken Given Mr. Groves' Refusal To Attend The Court-Order Deposition**
 22 **Prior to The Hearing.**

23 DPPs' arguments supported by Mr. Groves' declaration, including but not limited to the
 24 followings, must be stricken:

25 1. *ECF No. 341, Opposition, 2:2-5*: "As to the sales and inventory reports, which are
 26 relevant to show the prices Radio City paid for Celestron telescopes, Defendants already have better
 27 versions of this data, along with duplicative data from Radio City. (Declaration of Christopher
 28 Groves ("Groves Decl.") ¶¶ 3, 9, 11.) Defendants have everything they need to defend every aspect
 of this case. (*Id.*)

2. *ECF No. 341, Opposition, 12:27-13:10*: “Many of the component reports that were aggregated to form the composite reports do not even arguably contain any data that would be material to analyzing liability, damages, or class certification. (Groves Decl. ¶¶ 6, 8(c)-(f).) The only relevant information in the composite reports is the prices that Radio City paid for Celestron telescopes. (Groves Decl. ¶ 8(a)-(b).) However, the sales data that Celestron already has is more granular and thus more useful than anything in a Radio City composite report. (*Id.* ¶¶ 3, 7, 9, 11.) For this reason, the composite reports are not even of use to Celestron. (*Id.*) In contesting class certification, Celestron will use its own data because, in addition to having more details than the Radio City data, it also reflects sales to different customers. (*Id.*) Thus, even if none of the data in the composite reports were available, Celestron would not be prejudiced in its ability to defend any aspect of this case. (*Id.* ¶¶ 9-11.) But, as shown above, that is not even the case; Celestron has virtually everything that it claims was irretrievably lost.”

3. *ECF No. 341, Opposition, 13:18-22*: “Accordingly, even if Defendants wanted to use the sales data that Radio City produced instead of their own superior data, they already have all the material information that was in the composite reports. (Groves Decl. ¶ 9.) The disposal of the five composite reports will have no impact on Defendants’ ability to contest class certification, damages, or liability. (*Id.* ¶¶ 3, 9, 11.)”

4. *ECF No. 341, Opposition, 13:27-14:2*: “For DPPs to gain a material advantage, the data would have to show wildly low prices in the few months at issue. (Groves Decl. ¶ 10.) But a review of Defendants’ superior data set reveals no such anomalies. (*Id.*)” [footnote should be stricken as well]

5. *ECF No. 341, Opposition, 15:25-27*: “Nor could she, given that Defendants had superior information, and there were no anomalies in the four missing months out of many years of data that could even hypothetically advantage Radio City. (Groves Decl. ¶¶ 9-11.)”

In sum, the entire Opposition and the arguments in the Opposition are based on the “expert opinions” set forth presented without foundation or context in the declaration of Christopher Groves. Where there is no valid testimony of Christopher Groves, there is no basis in the Opposition.

IV. MONETARY SANCTIONS SHOULD ISSUE AGAINST BOTH CLIENT AND COUNSEL

“Under its ‘inherent powers’ a district court may also award sanctions in the form of attorneys’ fees against a party or counsel who acts in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Leon v. IDX Sys. Corp.*, 464 F.3d 961, 958 (9th Cir. 2006) (internal quotations omitted). “A party demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order.” *Id.* (internal quotations omitted).

Federal Rule of Civil Procedure (“FRCP”) 37(d)(1)(A)(i) provides that “[t]he court where the action is pending may, on motion, order sanctions if ... a party ... fails, after being served with

proper notice, to appear for the person's deposition." Further, FRCP 37(d)(3) provides the types of sanctions available when a party fails to appear for his deposition and are further listed in 37(b)(2)(A)(i)-(vi). Among the sanctions available are terminating and evidentiary sanctions. The sanctions available to the district court are discretionary. *See United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980). Instead of, or in addition to, the sanctions imposed, FRCP 37(d)(3) provides that the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was not substantially justified, or other circumstances make an award of expenses unjust. When it has been determined that a party has willfully failed to comply with discovery, it is within the discretion of the trial court to dismiss the action. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). Dismissal is a proper sanction under Rule 37(d) for a party's failure to appear for his own deposition. *See Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 611 F.2d 32, 35 (3rd Cir. 1980); *see also Young v. O'Reilly Automotive Stores, Inc.* (2018) WL 11483058.

Consistent with the DPPs' bad faith and Counsel for DPPs' pattern of bad faith conduct justifying the issuance of evidence sanctions, the Court should likewise award Defendants their attorneys' fees they incurred in connection with the preparation and prosecution of this Motion together with all fees and costs related to or associated with the attempt to obtain the deposition of Christopher Groves. DPPs have willfully disregarded an explicit and direct order of this Court in failing and refusing to produce Christopher Groves for deposition. For over a month, DPPs failed and refused to set a date for the Deposition of Christopher Groves. DPPs knew Defendants did not have the luxury of time in scheduling the Groves deposition, and intentionally and willfully delayed the process and willfully obstructed Defendants from taking the deposition of Christopher Groves. DPPs' objective was to frustrate and prevent the taking Mr. Groves' deposition prior to the April 4 hearing. DPPs conveniently offered three days of purported availability after the April 4 hearing, which is a cynical act that makes the conduct of the DPPs all the more actionable. The timing does not allow Defendants to depose Groves (in violation of the Court Order), and Defendants are thus unable to adequately prepare for the hearing on DPPs' Motion. DPPs' failure to comply with the

1 Court Order is inexcusable. Monetary sanctions are warranted pursuant to FRCP 37(d)(3).

2 DPPs and its Counsel have joint and several liability for the payment of monetary sanctions
3 in this situation. In the event the Court determines that such fees should be awarded, Defendants
4 respectfully request that they be permitted to submit Declarations, or such other documentation that
5 the Court deems necessary, to substantiate the amount of their respective fees.

6 This Court should further issue a bench warrant and an order to show cause to bring
7 Christopher Groves before this Court to testify as to why the Court's order that he provide testimony
8 by March 31 was violated.

9 **V. CONCLUSION**

10 For all of the foregoing reasons, Defendants respectfully request that this Court: (i) strike
11 the entirety of Direct Purchaser Plaintiffs' Opposition To Defendants' Motion For Terminating
12 Sanctions Against DPP Putative Class For Intentional And Irremediable Destruction Of Relevant
13 Evidence By The Sole Putative Class Representative (the "DPPs' Opposition"), (ii) strike the
14 entirety of the declaration of Christopher Groves, (iii) strike all arguments supported by the
15 declaration of Christopher Groves, (iv) order sanctions to compensate Defendants for the costs
16 incurred in bringing this Motion and all costs related to attempting to obtain the deposition of
17 Christopher Groves, and (v) issue a bench warrant and an order to show cause to bring Christopher
18 Groves before this Court to testify as to why the Court's order that he provide testimony by March
19 31 was violated.

20 DATED: March 27, 2023

WEINBERG GONSER FROST LLP

21 By: /s/ Christopher Frost

22 CHRISTOPHER FROST

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